No. 90-1038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS CIPOLLONE,
Petitioner,

v.

LIGGETT GROUP, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages and advertisements, preempts state tort law.

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INTEREST OF *AMICUS CURIAE*

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and the art of medicine and to improve the public health. Its 280,000 members—over half of all physicians currently licensed to practice medicine—practice in all fields of medical specialization.

Amicus has a strong interest in preserving the traditional prerogative of states to protect the health and safety of their citizens and believes that, absent clear evidence of congressional intent, this prerogative should not be undermined by federal action which is itself designed to protect the public health and safety. *Amicus* has a particularly strong interest in the proper outcome of this case because smoking is the leading preventable cause of premature death in this country and is thus a major threat to public health. By conferring an unwarranted immunity from tort suits on the tobacco industry, the court of appeals has provided that industry with significant incentives to pursue marketing practices that encourage individuals to begin or continue smoking, thereby causing untold human suffering. At a minimum, the availability of tort remedies in this setting will place the financial responsibility for these injuries on the parties most responsible for them—tobacco companies. Finally, *amicus* has a strong interest in correcting a misimpression created by some cigarette advertising that the medical community believes that smoking is safe or that certain cigarettes are "just what the doctor ordered." Pet. App. 6a-16a.

Because of the profound importance of this Court's decision on the public health of the nation, the AMA wishes to present its views concerning the proper disposition of the tobacco industry's claim of federal immunity from state tort actions.[1]

STATEMENT

Forty years after the first studies linking smoking and lung cancer, and 27 years after the Surgeon General's first report warning of smoking's myriad adverse health effects, smoking remains the "leading cause of preventable premature death" in this country. U.S. Surgeon General, *Reducing the Health Consequences of Smoking: 25 Years of Progress* 10 (1989) ("Surgeon General's 1989 Report"). Overall, the toll from smoking is staggering. Smoking is responsible for 30% of all cancer deaths, 21% of all deaths related to coronary heart disease, and 82% of all deaths related to emphysema and chronic bronchitis. *Id.* at 41. All told, cigarette smoke kills almost 500,000 Americans annually, substantially more than 1,000 individuals every day. 40 Center for Disease Control, *Morbidity and Mortality Weekly Report* 63 (Feb. 1, 1991) (430,000 deaths due to smoking); Glantz & Parmley, *Passive Smoking and Heart Disease*, 83 Circulation 1, 4 (1991) (53,000 deaths due to passive inhalation of smoke).

Although suspected for centuries, the link between smoking and illness was not firmly established until the early 1950's. See Doll & Hill, *The Mortality of Doctors in Relation to Their Smoking Habits: A Preliminary Report*, 1 Br. Med. J. 1451 (1954); Wynder & Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchogenic Carcinoma: A Study of 684 Proved Cases*, 143 J. A.M.A. 329 (1950). Relying on these and other studies demonstrating that tobacco causes cancer of the lung, larnyx, and oral cavity, as well as chronic bronchitis, the Surgeon General concluded in his landmark 1964 report that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Advisory Committee to the Surgeon General, *Smoking and Health* 33 (1964) ("Surgeon General's 1964 Report"). One year later, Congress enacted the Federal Cigarette Labeling and Advertising Act, which required manufacturers to warn smokers that smoking posed a threat to their health.

Since 1964, the scientific community has continued to explore the frightening relationship between smoking and illness. It is now known that cigarette smoke, which contains at least 43 carcinogenic agents, Surgeon Gen-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the AMA's filing as *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk of the Court.

eral's 1989 Report at 86-87, also cause esophageal cancer and is associated with a significantly heightened risk of cancer of the bladder, kidney, pancreas, stomach, cervix and endometrium. *Id.* at 43-58. It is now also known that smoking causes a wide array of nonmalignant, though potentially fatal, diseases and conditions in addition to chronic bronchitis, including coronary artery disease, cerebrovascular disease, peripheral vascular disease, emphysema, and intra-uterine growth retardation, *id.* at 59-72, and is associated with infertility, increased infant mortality, peptic ulcer disease and perhaps osteoporosis.[2] Even passive smokers—those who inhale the smoke of others—are now known to be at risk for smoking-related illnesses, including cancer of the lung and coronary artery disease. Glantz & Parmley at 6-10.

Perhaps most critically, research since 1964 has demonstrated that nicotine in tobacco smoke is highly addictive. According to the Surgeon General, "the pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction* 9 (1988). Nicotine is "psychoactive ('mood altering') and can provide pleasurable effects. . . . Nicotine also causes physical dependence characterized by a withdrawal syndrome that usually accompanies nicotine abstinence." *Id.* at 215.

Despite overwhelming evidence concerning the deadly and addictive effects of smoking, the tobacco industry has consistently maintained that there is no evidence that smoking actually *causes* the diseases to which it is statistically linked,[3] and the industry still publicly ques-

[2] Smoking was known to be statistically associated with some of these illnesses in 1964, but a causal relationship was not established until more recently. Surgeon General's 1989 Report at 98-99.

[3] The tobacco industry has, at various times, argued that the increase in the incidence of illnesses among smokers may be the result of improved ability to detect disease; that the association between smoking and illness is purely coincidental; that individuals who smoke are more prone to disease than non-smokers; that no one factor could cause so many diseases; that tobacco cannot be the cause of smoking-related illnesses because not all smokers become ill; and that all of the studies linking smoking and disease are flawed. E. Whelan, *A Smoking Gun: How The Tobacco Trade Gets Away With Murder* 15-27 (1984); Myers, *Federal Trade Commission Staff Report on the Cigarette Advertising Investigation* 1-58-65 (1981). None of these arguments stands up to rigorous analysis. See Myers at 1-65.

tions the link between smoking and illness.[4] Moreover, the industry still denies that smoking is addictive, claiming that it is merely a "habit" like many other innocuous habits.[5]

More important, the tobacco industry, through advertising and promotional campaigns, has for decades broadcast a message about the health effects of smoking that flatly contradicted the overwhelming scientific evidence and undermined to a great extent the mandated warnings on cigarette packages. The magnitude of this advertising and promotional effort is remarkable. The tobacco industry now spends close to $3.5 billion annually on advertising and promotion, making cigarettes one of the most heavily marketed consumer products. Surgeon General's 1989 Report at 500; Federal Trade Commission, *Report To Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 4 (1988). In 1985, cigarettes were the most heavily advertised product in outdoor media, the second most heavily advertised product in magazines, and the third most heavily advertised product in news-

[4] See, *e.g.*, *Tobacco Product Education and Health Protection Act: Hearing on S. 1883 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 77 (1990) (statement of Charles O. Whitley, Counsel, The Tobacco Institute) (referring to "alleged" health effect of smoking).

[5] *Id.* at 100 ("when you use the word addictive, we think that is the wrong word").

papers. Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 New Eng. J. Med. 725, 727 (1987). To a large extent, this massive campaign is driven by the tobacco industry's need to attract some 5,000 new smokers each day to make up for those who die or quit. K. Warner, *Selling Smoke: Cigarette Advertising and Public Health* 18 (1986).

In its advertising, the tobacco industry conveys the deceptive message that smoking is fully compatible with a healthy, active, successful, and independent lifestyle. Specifically, cigarette advertising distracts the public's attention from the health hazards of smoking by minimizing the health effects of smoking;[6] by showing smokers who convey positive personality characteristics such as sophistication, rugged individualism, attractive appearance, and independence (especially for women);[7] by showing smokers enjoying romantic, business, and social success; and by linking smoking to athletic endeavors, especially outdoors in the fresh air. K. Warner, at 46-48; Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 5-10 (1978). Smoke itself is rarely shown in advertisements because it is believed to convey a negative

[6] Cigarette advertisements, for example, imply strongly that "low-tar" cigarettes are safe. While there is some evidence that individuals who smoke such cigarettes are at lower risk for contracting certain cancers, there is strong evidence to suggest that the risk of cardiovascular disease, emphysema, and fetal damage is *not* reduced. See Benowitz, *Health and Public Policy Implications of the "Low-Yield" Cigarette*, 320 New Eng. J. Med. 1619, 1620 (1989); Davis, *Current Trends in Cigarette Advertising and Marketing*, 316 New Eng. J. Med. 725, 728 (1987).

[7] The link to women's independence is best illustrated by the well-known Virginia Slims slogan "You've come a long way baby." Ironically, because so many women now smoke, lung cancer has recently surpassed breast cancer as the leading cause of cancer death among women. Surgeon General's 1989 Report at 46.

image, K. Warner, at 47, and indeed cigarettes themselves are frequently not shown in advertisements.[8]

Increasingly, to maintain or increase sales, cigarette manufacturers have targeted their advertisements at specific segments of the market. In recent years, for example, they have focused on inducing women, minorities, blue collar workers, and children to smoke.[9] See *Reynolds, After Protests, Cancels Cigarette Aimed at Black Smokers*, N.Y. Times, Jan. 20, 1990, at A1, col. 3; B. Maxwell & M. Jacobson, *Marketing Disease to Hispanics: The Selling of Alcohol, Tobacco, and Junk Foods* 37-42 (1989); Davis, at 728-31. Of these groups, children are clearly at the highest risk because they are the most susceptible to advertising. More than 90% of regular smokers begin to smoke before the age of 20, and, although most young people are aware, to some extent, that smoking is dangerous, most have significant misperceptions about the gravity of the risk. See Surgeon General's 1989 Report at 212-16; Leventhal, Glynn & Fleming, *Is the Smoking Decision an 'Informed Choice'?*, 257 J. A.M.A. 3373-76 (1987).

Children are not the only Americans who misperceive the risks of smoking. Due to the efforts of the Surgeons General and many others, most Americans are now generally aware that smoking is unhealthy. Nevertheless, the public's knowledge of the health effects has remained remarkably limited. Surveys demonstrate, for example, that many Americans cannot identify many of the most common illnesses caused by smoking. See Myers, *Federal Trade Commission Staff Report on the Cigarette Advertising Investigation 3-45-48* (1981). Moreover, studies

[8] Examples of cigarette advertisements are included in the Appendix.

[9] Cigarette advertisements frequently contain cartoon characters, and manufacturers advertise heavily in publications with large teenage readerships. See Davis, at 730.

show that Americans have little understanding of just how dangerous cigarettes are. Americans underestimate substantially the absolute health risk of smoking, the relative risk of dying or of developing disease, and the risks of dying from smoking compared to the risk of dying from other causes. Surgeon General's 1989 Report at 204-12.

In sum, cigarettes are powerfully addictive and frequently lethal products. Responding to mounting evidence of the adverse effects of smoking more than 25 years ago, Congress required manufacturers to warn consumers that smoking was dangerous. Through a massive campaign of disinformation, however, manufacturers have undermined the force of this warning and have continued to induce new smokers to try, and to continue to use, their inherently dangerous product. Ironically, the tobacco industry now argues that Congress, in the legislation requiring manufacturers to warn consumers of the health consequences of their product, also immunized this industry from all tort suits.

SUMMARY OF ARGUMENT

In the Federal Cigarette Labeling and Advertising Act ("the Labeling Act"), Congress responded, first, to the growing body of scientific evidence discussed above that linked smoking to a number of fatal diseases, and, second, to a number of diverse and potentially conflicting regulatory measures that state and local governments, as well as the Federal Trade Commission, were considering implementing in response to this scientific evidence. The Labeling Act established a nationally uniform warning for cigarette packaging and advertising that was designed, primarily, to inform consumers of the hazardous nature of smoking and, secondarily, to forestall the confusion and economic dislocations that numerous inconsistent labeling requirements might cause.

The Labeling Act, however, was not designed to preempt state common law tort actions such as those that petitioner brought against respondents, nor does the Act have such preemptive force. Such state tort actions, which deter conduct injurious to the public health and safety and/or provide remedies to injured individuals, touch on areas that are traditionally matters of local concern. *Barsky* v. *Board of Regents*, 347 U.S. 442, 449 (1954). While Congress certainly can preempt state law even in areas that lie at the core of the states' historic police powers, it must do so clearly and unambiguously, and any doubts as to the preemptive sweep of a federal law that might displace such powers must be resolved against preemption. *English* v. *General Elec. Co.*, 110 S. Ct. 2270 (1990).

Here, the language, purpose, and history of the Labeling Act all militate against a finding of preemption. The Labeling Act's express preemption provision is a narrow one, prohibiting states from requiring *statements* other than the congressionally mandated warning *on* cigarette packages, see 15 U.S.C. § 1334(a), and barring States from enacting cigarette industry-specific laws or regulations governing cigarette advertising and promotion. *Id.* § 1334(b). Neither subsection unambiguously purports to displace all state laws that relate in any way to smoking.

The Labeling Act, moreover, does not impliedly preempt state tort actions. By mandating a single-sentence warning that smoking is injurious to health, Congress in no way occupied the entire field of smoking and health. Nor is there any actual conflict between the Labeling Act and state tort law. Compliance with both the federal warning requirement and any obligations imposed by state tort law is not physically impossible. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). Moreover, to the extent there is any tension between the incidental regulatory effects of state tort law and the Labeling Act's secondary goal of uniformity, the

legislative debates surrounding the Act, all of which assumed the continued availability of state tort actions, and the language of the Act itself, make clear that such tension is not only tolerable, but that the goal of promoting public awareness of the health hazards of smoking must take precedence. *Silkwood*, 464 U.S. at 254-57.

ARGUMENT

Whether federal legislation preempts state law is ultimately a question of congressional intent. *Schneidewind* v. *ANR Pipeline, Co.*, 485 U.S. 293, 299 (1988). Congress may manifest a desire to displace state law in several ways. First, Congress may preempt state law expressly. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemptive intent may be inferred where the scheme of federal regulation is so comprehensive or pervasive that Congress can be said to have "left no room" for supplementary state regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, even where Congress has not completely displaced state regulation, state law may nevertheless be preempted to the extent it actually conflicts with federal law. Conflicts arise when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Several well-settled principles guide this Court's preemption analysis. Thus, while Congress certainly can preempt state law even in areas, such as public health and safety, that are traditionally matters of local concern, *Barsky*, 347 U.S. at 449, its "intent to supersede state laws must be 'clear and manifest.'" *English*, 110 S. Ct. at 2275 quoting *Rath Packing Co.*, 430 U.S. at 525, quoting *Santa Fe Elevator Corp.*, 331 U.S. at 230. This

Court, therefore, will "not [] conclude that Congress legislated the ouster of [state law] . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 146-47. As *amicus* demonstrates below, no mandate to eliminate state tort law and immunize the tobacco industry from liability for the injuries its products cause can be found in the Labeling Act.

I. CONGRESS DID NOT EXPRESSLY PREEMPT STATE TORT LAW IN THE LABELING ACT.

Section 5 of the Labeling Act specifies the statute's preemptive effect. At the time of the Act's initial passage, Section 5 provided that:

> (a) [n]o statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) [n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 300 (1965). In 1970, Congress modified subsection (b) to provide as follows:

> [n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

Because these provisions do not clearly and unambiguously preempt state common law torts, every court that has passed on the question has concluded that the Labeling Act's preemption provision does not extend to state tort law.[10] These decisions are plainly correct.

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[10] See Pet. App. 100a-103a; *Pennington* v. *Vistron Corp.*, 876 F.2d 414, 418 (5th Cir. 1989); *Roysdon* v. *R. J. Reynolds Tobacco*

The language of the 1965 and 1970 preemption provisions falls far short of evincing a clear congressional desire to displace the states' historic police powers. To begin with, neither version of Section 5 explicitly mentions state common law. The absence of any such reference stands in stark contrast to the preemption provisions of other enactments in which Congress has left no doubt that it meant to displace state common law.[11]

Had Congress actually intended the Labeling Act to preempt petitioner's common law claims, moreover, it could hardly have chosen a more elliptical and ultimately ineffectual way of expressing its desire than the language employed in Section 5. While some tort actions might *induce* cigarette manufacturers to include additional statements about the health hazards of smoking on cigarette packages, tort law does not *require* the only action sub-

Co., 849 F.2d 230, 234 (6th Cir. 1988); *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987); *Stephen* v. *American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1050 (Ind. Ct. App. 1990); *Forster* v. *R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 658 (Minn. 1989); *Dewey* v. *R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239, 1247 (1990) (reproduced at Pet. App. 181a-226a); *McSorley* v. *Philip Morris, Inc.*, 565 N.Y.S.2d 537, 538-39 (1991); *Hite* v. *R.J. Reynolds Tobacco Co.*, 396 Pa. Super. 82, 578 A.2d 417, 419-20 (1990); *Philips* v. *R.J. Reynolds Indus., Inc.*, 769 S.W.2d 488, 490 (Tenn. Ct. App. 1988); *Carlisle* v. *Philip Morris, Inc.*, 805 S.W.2d 498, 517 (Tx. Ct. App. 1991).

[11] See, *e.g.*, the Housing and Urban-Rural Recovery Act of 1983, 12 U.S.C. § 1715z-17(d) (preempting any "State constitution, statute, court decree, *common law*, rule, or public policy" affecting specified mortgages) (emphasis added); the Copyright Act of 1976, 17 U.S.C. § 301(a) (providing that "no person is entitled to any [copyright] or equivalent right . . . under the *common law* or statutes of any State") (emphasis added); Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (superseding "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan") (emphasis added).

section (a) prohibits—the making of statements on cigarette packages. Even the slightly broader language of Section 5(b) does nothing more than bar states from enacting cigarette industry-specific laws and regulations. Indeed, to read the "based on smoking and health" language more broadly—*i.e.*, as barring all state law-based requirements or prohibitions that *relate to* smoking and health—would prove entirely too much: such a reading would, for example, exempt the cigarette industry from generally applicable state and local laws governing the size and placement of advertisements on public streets or highways—a result that finds absolutely no support in the Labeling Act's structure, purpose, or history.

Amicus submits that common law tort actions fall outside the reach of Section 5, which, by its plain terms, only preempts state efforts to pass cigarette industry-specific laws and regulations.[12] In any event, because the reading of Section 5 that *amicus* posits is at least plausible, the preemptive effect of the Labeling Act on state tort law is, at a minimum, ambiguous. Such ambiguity is sufficient, standing alone, to defeat a claim of express preemption.

II. THE LABELING ACT DOES NOT IMPLIEDLY PREEMPT STATE TORT LAW.

A. Congress Has Not Occupied The Entire Field Of Protecting The Public From The Myriad Dangers Caused By Or Associated With Cigarette Smoking.

The narrow scope of the Labeling Act's preemption provision is hardly surprising in light of the limited objectives of the Act itself. The catalyst behind the Act

[12] Indeed, this is the reading that Congress itself has endorsed. See S. Rep. No. 566, 91st Cong., 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 2652, 2663 ("The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health").

was the Surgeon General's 1964 report, which concluded that cigarette smoking was a significant health hazard warranting "appropriate remedial action." The Report itself, however, did not specify what remedial action should be taken or by whom, and, as a result, a number of state and local governments (as well as the Federal Trade Commission) responded by proposing or adopting a variety of regulatory measures, principally warning requirements on cigarette packages and advertising warning requirements. *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Comm. on Interstate & Foreign Commerce*, 91st Cong., 1st Sess. 554 (1969).

The Labeling Act represented Congress' response to both the growing body of medical evidence that smoking was hazardous, and the potentially inconsistent state and local warning requirements that the medical evidence threatened to spawn. Thus, the Act established a nationally uniform warning for cigarette packaging and advertising that was designed, first and foremost, to inform consumers of the hazardous nature of smoking and, secondarily, to forestall the confusion and economic dislocations that numerous inconsistent labeling requirements could cause.[13] Consistent with these objectives, Congress preempted state authority to prescribe additional or different affirmative warnings on cigarette packaging or in cigarette advertising, and barred states from

[13] The subordinate nature of the Labeling Act's secondary goal is made clear in the Act's statement of purpose, which provides that the national economy is to be protected from the effects of diverse warning requirements "to the maximum extent consistent with [the] declared policy" of informing the public of the dangers of smoking. 15 U.S.C. § 1331(2). See also H.R. Rep. No. 449, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2350 ("The *principal* purpose of the bill was to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages") (emphasis added).

enacting prohibitions that would effectively compel such affirmative warnings.

It is altogether untenable, however, to suggest that, by prescribing a single-sentence warning and barring States from requiring any other, Congress occupied the entire field of protecting the public from the myriad dangers caused by or associated with cigarette smoking. The Labeling Act is in no sense "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citations and internal quotations omitted). To the contrary, it says nothing whatever about the duties and liabilities of cigarette manufacturers or the rights of their consumers;[14] it does not purport to regulate the marketing behavior of the cigarette industry or the safety of cigarette products; it provides no alternative means of redress for the hundreds of thousands of people who die or become seriously ill each year as a result of smoking, nor does it establish a fund out of which these victims of smoking may be compensated.[15]

The explanation for Congress' limited response is simple, *viz.*, it lacked a full understanding of the health hazards posed by smoking and the societal impacts those hazards would have. The Surgeon General's 1964 Report concluded that cigarette smoking caused a number of fatal illnesses (notably lung cancer) and was associated with a number of others (such as coronary artery dis-

[14] Compare *International Paper Co.* v. *Ouelette*, 479 U.S. 481, 497 (1987) (Clean Water Act "specifically provides for a process whereby the[] interests [of source and affected States] will be considered and balanced . . .").

[15] See, *e.g.*, *Federal Coal Mine Health and Safety Act*, 30 U.S.C. § 901 *et seq.* (establishing comprehensive compensation scheme for victims of black lung disease).

ease), and that deaths attributable to these diseases had increased "with great rapidity over the past few decades." Surgeon General's 1964 Report at 25. The Report acknowledged, however, that the "total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated," *id.* at 31, at least in part because of the difficulties of pinpointing the causal relationship between cigarette consumption and certain diseases.[16] Recognizing the need for further research, Congress required the Secretary of Health, Education and Welfare (now Health and Human Services) to report annually on "current information [o]n the health consequences of smoking, and . . . [to make] such recommendations for legislation as he may deem appropriate." 15 U.S.C. § 1337(a).

Subsequent research has revealed that smoking is even more dangerous than previously thought. As *amicus* explained above, smoking is now known to cause esophageal cancer as well as a variety of serious and potentially fatal vascular diseases, and is known now also to be associated with a number of other malignant and non-malignant diseases and impairments of the reproductive system, some of which were not even considered at the time of the 1964 report. Perhaps most significantly, the pharmacologic and behavioral bases of nicotine addiction have only recently been established. U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction* 215 (1988).[17]

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[16] See, *e.g.*, Surgeon General's 1964 Report at 31 ("It is recognized that no simple cause-and-effect relationship is likely to exist between a complex product like tobacco smoke and a specific disease in the variable human organism"); *id.* at 38-39 (noting that effects of nicotine and smoking "do not account well for the observed association between cigarette smoking and coronary disease," which, then as now, was one of the leading causes of death in males).

[17] Congress, of course, has been kept apprised of these developments. Thus, for example, in the Senate Report that accompanied the 1970 amendments to the Labeling Act, Congress noted the then-current advances in medical research. See S. Rep. No. 566, *reprinted in* 1970 U.S. Code Cong. & Admin. News at 2654-55.

The suggestion that Congress was 1) aware that smoking was suspected to be one of the nation's leading causes of preventable death and illness and 2) aware that the full nature of the health effects of smoking had not been determined, yet nevertheless chose to strip millions of American smokers of any right to redress for injuries inflicted by this lethal product is not realistic. See *Silkwood*, 464 U.S. at 252 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").[18] To the contrary, the Labeling Act can only be understood as Congress' first effort to explore, rather than to occupy, the expanding field of smoking-related illness and death.

B. There Is No Actual Conflict Between State Tort Action And The Purposes Of The Labeling Act.

Because state tort law can only compel the payment of damages, compliance with such state laws and the Labeling Act is not physically impossible. *Cf. Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185-86 (1988) (operator of federal facility "may choose to disregard [State] safety regulations and simply pay an additional

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[18] Such a result is particularly unthinkable in view of the fact that cigarette manufacturers never even asked Congress to exempt them from liability under state tort regimes (even though tort suit had been brought against manufacturers as early as the 1950s, see Comment, *The Product Liability of the Tobacco Industry: Has Cipollone v. Liggett Group Finally Pierced the Cigarette Manufacturers' Aura of Invincibility?*, 30 B.C.L. Rev. 1103, 1117-26 (1989)), and instead sought relief only from the "intolerable" burden of inconsistent labeling requirements. See *Cigarette Labeling and Advertising Act: Hearings on S. 559 and S. 547 Before the S. Comm. on Commerce*, 89th Cong., 1st Sess. 246 (1965) (testimony of Bowman Gray, Chairman, R.J. Reynolds Tobacco Company).

workers' compensation award if an employee's injury is caused by a safety violation"); *Silkwood*, 464 U.S. at 257 ("Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible"). The Labeling Act can only preempt state tort actions, therefore, if such actions frustrate the purposes and objectives of the Act.

The Third Circuit concluded that state tort law is preempted based on its determination that state tort actions would upset Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy." Pet. App. 105a. This reasoning is flawed in a number of crucial respects.

To begin with, as the previous analysis reveals, the Labeling Act does not represent a carefully drawn balance between the competing interests of smokers and manufacturers. Congress did not purport to fix the rights and liabilities of smokers and manufacturers or to regulate their relationship in any way. See *supra* at 15-16. The Third Circuit's contrary determination, moreover, necessarily assumes that Congress established the federally-mandated warning as a cap on the amount of information the public could obtain concerning the manifold dangers of smoking, "lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy." *Banzhaf* v. *FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). This cynical assumption is unwarranted given Congress' awareness that "cigarette smoking contributes substantially to . . . the [nation's] overall death rate," Surgeon General's 1964 Report at 31, and its recognition that the full scope of smoking's contribution to the nation's mortality was not yet known.[19]

[19] In construing the preemptive force of the Atomic Energy Act, this Court noted in *Silkwood* that, while the primary purpose of the Act was the promotion of nuclear power, Congress did not intend to pursue nuclear power at all costs. 464 U.S. at 257. Here, by contrast, the primary purpose of the Labeling Act was to protect the public health; indeed, even the secondary purpose was not to "promote" an industry whose products "contribute[] substantially . . . to the overall death rate," Surgeon General's 1964 Report at 31, but simply to protect that industry from diverse and inconsistent labeling requirements.

State tort actions, moreover, do not upset the only balance Congress actually struck in the Labeling Act: that between the desire of state and local entities to prescribe mandatory warning requirements and the desire of the tobacco industry to avoid diverse and inconsistent labeling requirements. While damage awards may induce cigarette manufacturers to provide additional information about the dangers of their products, to refrain from disseminating false information, or to attempt to make their products safer, such awards neither require nor prohibit any particular conduct with respect to the advertising of cigarettes, and in no way do they compel a manufacturer to place a state-prescribed warning label on any cigarette package or advertisement.[20] *Cf. International Paper Co.*, 479 U.S. at 495 (state nuisance laws preempted because they would subject polluters "to the threat of legal *and equitable* penalties . . . [which] would *compel* the [polluter] to adopt different control standards and a different compliance schedule from those approved by the EPA . . ."; a state court "also could *require* the [polluter] to cease operations by ordering immediate abatement") (emphases added).

Finally, to the extent there is any tension between the incidental regulatory effects of state tort actions and the secondary purpose of the Labeling Act, Congress plainly viewed such tension as tolerable. *First*, Congress barred states from imposing requirements or prohibitions on

[20] Strict liability actions, moreover, do not induce any behavior modification, except perhaps a total cessation of a subject activity, since by definition a defendant cannot take remedial steps to avoid liability under this tort theory.

cigarette advertising "based on," rather than those "relating in any way to," smoking and health. See *supra* at 13. Having chosen to preempt only cigarette-specific state laws and regulations, Congress must be presumed to have concluded that the incidental regulatory effects of generally applicable state tort duties are fully compatible with the purposes of the Act.

Second, the legislative history makes unmistakably clear that Congress believed state tort actions would continue to be available after passage of the Act. Thus, while there is not a single statement in the legislative history indicating that Congress intended to preempt state tort law, there was considerable discussion concerning the effect that the federally-mandated warning would have on the *outcome* of such suits, particularly in duty to warn claims.[21] *Cf. Silkwood*, 464 U.S. at 254 ("the importance

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[21] See, *e.g.*, *Cigarette Labeling and Advertising Act: Hearings on H.R. 643, 1237, 3055, 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 579 (1969) (statement of Congressman Watson) ("[N]owhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability [claim], as far as I know"); *Id.*, at 577-82, 589 (congressional discussions concerning effect of 1965 Act on assumption-of-risk defense); *Cigarette Labeling and Advertising Act: Hearings on H.R. 2248, 3014, 4007, 7051, 4244 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 176 (1965) (statement by Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare) (Common-law suits were "a private matter . . . not regullated by this bill"); *Memorandum to Record, Hearings on H.R. 2248 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 177-78 (1965) ("Assuming a clear statement [required of manufacturers], suits based on negligence probably would be barred on three grounds. Having warned the buyer, the manufacturer could not be said to be negligent; the buyer is contributorily negligent in using a product he knows might harm him; and having been warned the buyer assumes the risk attendant to the use of the cigarettes. . . . [A]ctions based on breach of warranty would probably be unsuccessful. When a seller warns a buyer of the possibility of a certain form of injury, it cannot be said that he

of the legislation for present purposes is not so much in its substance, as in the assumptions on which it was based"). Congressional recognition of the significant, non-preemptive effects federal law would have on state tort law actions is completely inconsistent with the contention that Congress immunized tobacco companies by broadly preempting state law. Moreover, Congress understood that for many state tort actions the warning labels would significantly enhance the tobacco companies' arguments that they acted reasonably. This would in turn have a significant impact on the deliberations of the trier of fact in a tort action. In short, Congress did not ignore the tobacco industry; it simply did not immunize it, which is hardly surprising in view of the fact that the industry did not seek such relief. See note 18, *supra*.

Whatever the evidentiary value of the warning label in such actions, however, the significance of this legislative history is crystal clear. Preemption is ultimately a question of congressional intent, and here Congress contemplated the coexistence of the federal warning label requirement and state tort actions against manufacturers even though they comply with that requirement. Under these circumstances, there can be no doubt that Congress viewed any tension between the regulatory effects of tort law and the Labeling Act's requirements as tolerable.

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is warranting that the injury will not occur"; 111 Cong. Rec. 16543-45 (daily ed. July 13, 1965) (statement of Congressman Fascell) ("The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of 'assumption of risk' and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user. . . . By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this product does so with knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit").

The United States Code abounds with evidence of Congress' concern for the health and welfare of this nation. Federal law regulates the quality and safety of the food and drugs we consume, the cars we drive, the industries in which we work, the air we breathe, and the water we drink. Nevertheless, the cigarette industry contends that in passing a law whose principal purpose was to inform the public of the profound dangers of smoking, Congress granted a blanket immunity from liability to the manufactures of what is today the "leading cause of preventable premature death" in the United States. What is more, the industry contends that Congress singled out this lethal product for such extraordinary treatment without comment or debate, and without granting the hundreds of thousands of people who die or become seriously ill from smoking each year any alternative remedy. Nothing in the Labeling Act's language, purpose, nor history supports, let alone compels, this result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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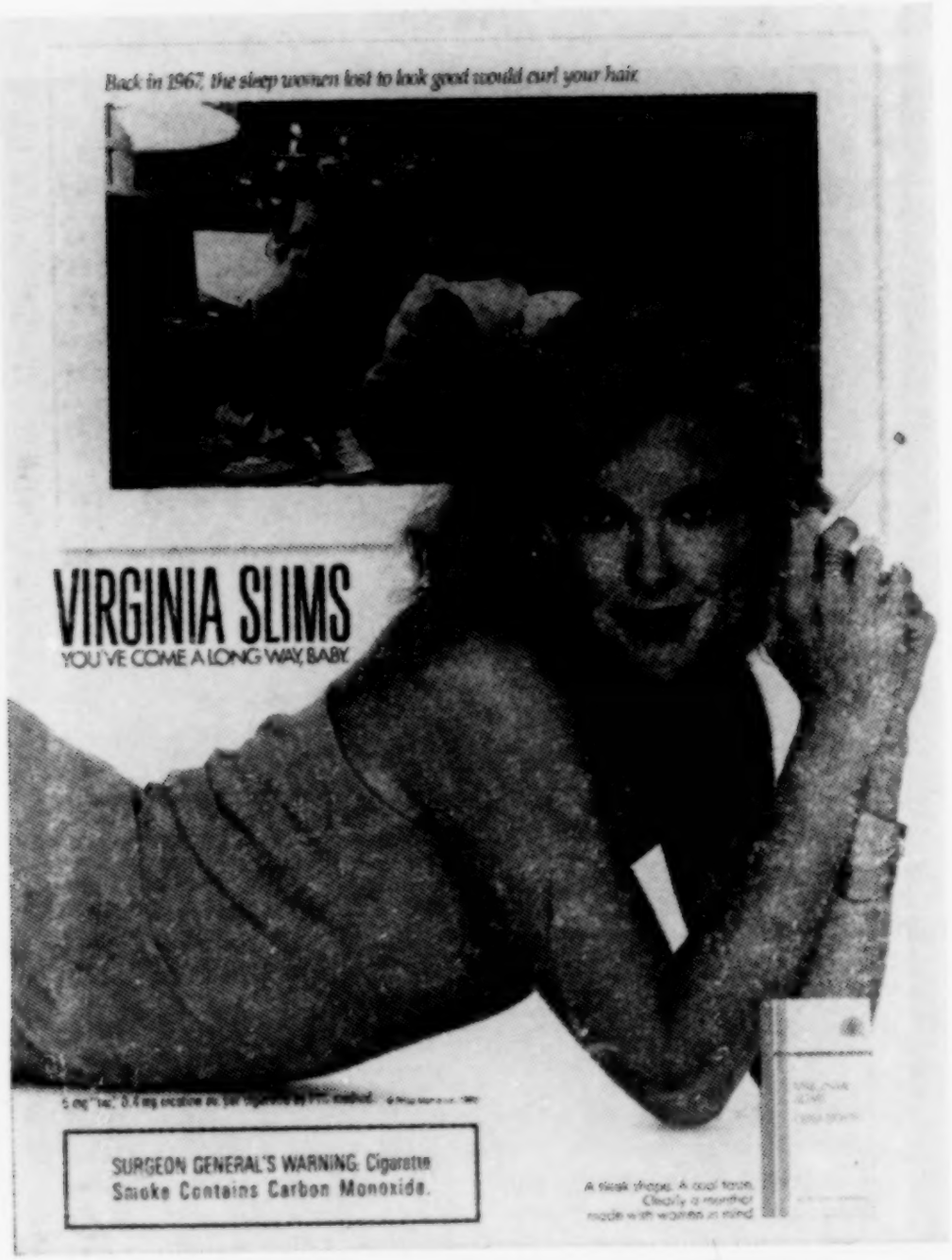
APPENDIX

APPENDIX


Newport
Alive with pleasure!
Newport Newport
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

2a


Back in 1967, the sleep women lost to look great would curl your hair.
VIRGINIA SLIMS
YOU'VE COME A LONG WAY, BABY.
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

3a


Salem
The REFRESHEST
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.


Marlboro
SURGEON GENERAL'S WARNING: Quitting Smoking
Now Greatly Reduces Serious Risks to Your Health.


CAMEL